THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES
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"I THINK THE OWNER OF THAT NEW, COMPETING BUSINESS NEXT DOOR LOOKS FAMILIAR."

Imagine that the business opening next door looks identical to your business. Not only does it engage in exactly the same business as you, it also produces the same goods or provides the same services, and uses your same methods. It even uses your customer lists to open and service accounts. Looking more closely, you find that the operator of your new competitor is your former assistant manager or maybe the person from whom you bought your business. Could this situation have been avoided? If so, how?

Depending on your perspective, Colorado actually provides few protections from such competition and the use of noncompete agreements is limited to very specific circumstances or they are void. In fact, the noncompete statute states, "any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor from an employer shall be void." But the statute provides exceptions, which are: (1) any contract for the purchase and sale of a business or the assets of a business; (2) any contract for the protection of trade secrets; (3) any contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years; and (4) executive and management personnel and officers and employees who constitute professional staff to executive and management personnel. With respect to the last exception (*i.e.*, managers and officers), the determination as to whether the employee qualifies depends on the position they were in when they signed the agreement, not when they left the company. So, for example, having a production employee sign a noncompete agreement will be unenforceable even if the employee later becomes manager of the department. In sum, if the individual does not meet one of these exceptions, the noncompete agreement will be void.

Additionally, employers who require employees to sign noncompete agreements in violation of this law run the risk of having the employee call their bluff by suing for damages. An Oregon case demonstrates such a concern. In *Dymock v. Norwest Safety Protective Equipment for Oregon Industry,* Inc., 19 P.3d 934 (Or. App. 2001), the employer required employees to sign an employment contract that prohibited employees from soliciting the employer's customers and other employees for five years after termination. Mr.

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Dymock refused to sign the agreement and was fired. He sued for wrongful discharge, citing an Oregon statute, similar to Colorado's statute, that conferred an employment-related right not to be subjected to a noncompete provision. The Oregon court agreed that terminating the employee for refusing to give up this right was a violation of public policy. Colorado courts have not ruled on the specific issue of liability for punishing an employee who refuses to sign an illegal non-compete. But it's a concern for organizations considering requiring such agreements where the relationship with the employee does not meet one of the exceptions.

Finally, to be enforceable, noncompete agreements must be limited to a reasonable geographic scope and duration. What constitutes a reasonable scope and time varies from one business to another based on market area and other factors.

Employers may also protect employees and former employees from using the employer's trade secrets. Trade secrets are protected pursuant to the Uniform Trade Secrets Act, C.R.S. § 7-74-101 *et seq*. A trade secret is defined as being "the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value." To be a "trade secret" the owner must take measures to prevent the secret from becoming available to persons other than those selected by the owner to have access.

Whether something is a trade secret may be determined by the extent to which it is known both inside and outside the business, as well as the precautions taken to guard the secrecy of the information. The value of the trade secret to the holder and the amount of time and expense it would take for others to duplicate it are also factors to be considered. The holder of a trade secret may obtain an injunction to prevent or restrain the actual or threatened misappropriation of the trade secret. Damages may also be obtained including actual loss, unjust enrichment and, under certain circumstances, exemplary or "punitive" damages.

Practical Tip. Well-drafted noncompete agreements and carefully preserved trade secrets provide protection from having to compete with a cloned version of your own business.

ADMINISTERING MANDATORY VACCINATION POLICIES

Employers, particularly those in health-care fields, increasingly require their employees to receive a flu vaccination. According to the Centers for Disease Control and Prevention, 96.5 percent of health-care workers in organizations with vaccination requirements received the flu vaccine for the 2012-2013 influenza season. But what happens when an employer institutes mandatory vaccinations and an employee requests permission not to comply? Given that seasonal flu has come knocking, now is a great time to review your policies and practices with respect to mandatory vaccinations.

The Equal Employment Opportunity Commission, in a series of informal discussion letters, explained its position on mandatory vaccinations, reminding employers that such policies are subject to both the Americans with Disabilities Act's requirements regarding reasonable accommodations as well as Title VII's protections for religious accommodations.

Under the ADA, an employee's request for an exemption from a mandatory vaccination may be based on a disability that prevents the employee from taking the vaccine. Similarly, under Title VII, an employee may have a sincerely held religious belief or practice that prevents vaccination. If the reason for the exemption is either a disability or a request for religious accommodation, the employer must explore with the employee whether the exemption is reasonable or if it poses an undue hardship for the employer. Factors the EEOC found potentially relevant to this determination include the assessment of the public risk posed at a particular time, the availability of effective alternative means of infection control (*e.g.,* masks, gloves, and gowns), and, potentially, the number of employees who actually request accommodation.

Additionally, it's important to remember that an employee's sincerely held religious beliefs don't need to be based on an organized religion, and can be moral or ethical beliefs "held with the strength of traditional religious views." *See* page 4 of this Employer's Advisory for an article on religious accommodations. Furthermore, while an employee can be required to provide information about her belief, the EEOC cautions that employers should not request "unnecessary or excessive corroborating evidence" because such actions could lead to claims of denial of reasonable accommodation or discriminatory harassment.

Put simply, if it would not pose an undue hardship, an employer may be required to provide the employee with a reasonable accommodation (*e.g.,* wearing a mask and gloves during work time) in lieu of requiring the employee to receive the vaccination. So, employers who have a vaccination policy should be prepared to handle requests for accommodations, or even make exemptions, based on disability or religious accommodation requests by engaging in a conversation with the employee, and carefully considering alternatives to vaccination.

COLORADO'S SOCIAL HOST DEFENSE: WHEN THE PARTY'S OVER, WILL YOU BE LEFT TO PICK UP THE TAB?

"Fun Bobby," a 28-year-old man employed by the Happy Hotel, was so pleased to be going to Happy Hotel's employee appreciation dinner that he decided to celebrate a little early. So, he had a drink or two at home and then left for the party, bringing his flask with him.

Happy Hotel's management was concerned about employees becoming intoxicated during the party. So, it decided that each attendee would receive only two drink tickets, and planned to serve only beer and wine at the party. Unfortunately, the bartender who was also the general manager of Happy Hotel's restaurant had a bottle of rum from the hotel's liquor supply with him. Bobby quickly took advantage and replenished his now-empty flask. And then replenished it again.

Eventually, Bobby left the party with a group of people, all headed for Bobby's house. They arrived safe and sound. Then, after about 20 minutes, Bobby decided to drive a co-worker home who had become intoxicated at the party. Sadly, Bobby caused an accident that injured Bobby and the driver of the other car. Not surprisingly, the other driver sued the Happy Hotel. Happy Hotel defended against the claim and filed for summary judgment on the grounds that it was not liable for Bobby's actions. What should the court do?

In the real case on which these facts are based, the California Court of Appeals reversed the trial court's ruling granting summary judgment in

the hotel's favor. The court found that there were genuine issues of material fact and left it to a jury to decide whether the hotel should be liable for an employee's actions. As to the fact that the employee had already arrived safely home from the party and then left his home when the accident occurred, the court found that a jury could determine the hotel created the risk of harm by allowing an employee to consume alcohol to the point of intoxication. So, the hotel must proceed to trial and convince a jury that it shouldn't be held liable.

Unlike California, Colorado provides organizations a "social host" defense. This defense, which applies to employers as well as hosts of dinner parties and other private affairs who provide alcoholic beverages for social purposes, shifts liability for the employee's actions from the employer to the intoxicated employee. This defense is the legislature's attempt to acknowledge that the proximate cause of injuries inflicted by an intoxicated person is the consumption of alcoholic beverages rather than the sale, service, or provision of such beverages. Therefore, the responsibility for drinking alcohol is on the consumer, not the provider.

While there are exceptions to when this defense can be used, those exceptions probably would not apply to the Happy Hotel under the facts presented. Importantly though, this defense is not available if the employee is acting within the scope of his employment, and the employer could very easily be found liable if the facts indicated that participation in the consumption of alcohol was required by the employer, or if the employee was still on the clock or performing work-related activities while drinking.

Practical Tip: If your organization has events planned where alcohol will be provided for employees and wants to benefit from the social host defense, make sure that alcohol is not consumed during work hours, that participation in the social event is voluntary, and that no pressure is placed on the employee to either attend or drink. So, don't plan on presenting any important work-related information during the time alcohol is being served, and, of course, don't discipline employees for not participating. Also, consider enforcing a drink ticket maximum, not allowing employees to bring in alcohol, and serving alcohol for only a limited period of time and with a meal. And, of course, the bartenders should be instructed not to serve alcohol to anyone who appears intoxicated.

HANDLING RELIGIOUS ACCOMMODATION REQUESTS

The holidays are upon us. Jerry and Elaine are in the Human Resources office asking to wear shirts emblazoned with "Festivus - The Holiday for the Rest of Us." The Human Resources manager laughs at their request and tells them that they can only wear "traditional holiday attire." Did the HR manager speak too quickly in responding to this request?

Let's start with the basics. First, both federal and Colorado law prohibit discrimination and harassment because of a person's religion, including the display of religious items. Second, "religion" is defined broadly, but is not without limits. For example, courts have held the Black Muslim faith, with its personal creed that required greeting everyone with "have a blessed day," and atheism to be genuinely religious. But courts have also rejected membership in the Ku Klux Klan and a "personal religious creed" that "Kozy Kitten People/Cat Food" contributed to an employee's "state of well being" as "religions." *Brown v. Pena (S.D. Fla. 1977).* Third, employers must

accommodate religious displays unless doing so would cause an undue hardship to the organization or the practice challenged is a business necessity or a bona fide occupational requirement that conflicts with the religious practice.

Under this reasonable accommodation approach, courts have permitted employees' right to wear items in the workplace: crosses, Star of David, beards, dreadlocks, head scarves, Yarmulkes, Sikh turbans, and traditional Islamic dress. But courts have also rejected an employee's requested religious accommodations when the request creates an undue hardship on the employer or is inconsistent with the performance of the essential functions of the positions. For example, previous court decisions determined that:

• Employer properly terminated for safety reasons a firefighter whose beard interfered with the sealing of his respirator and an electrician whose turban interfered with his respirator and hard hat.

• Police departments reasonably refused police officers' demands to wear a small cross and a hijab while in uniform so as not to endorse any religion.

• A membership warehouse reasonably asked an employee to remove or cover multiple visible facial piercing to maintain a professional business appearance.

Organizations facing religious accommodation requests should consider adopting the following approach to addressing such requests:

1. **Read** your job descriptions, handbook and other policies. Courts, administrative agencies, and hearing officers will ask you or themselves: "If this standard is important to the business why didn't they say so?"

2. **Ask why.** Courts will not accept speculation as to your business needs. If you cannot objectively articulate why a policy meets a business need you should consider revisiting your standards. If your first response is "it's obvious," you are guaranteed that it isn't to others.

3. If you receive an accommodation request, **calculate** the impact. You may not be able to calculate an exact financial impact, but you should be able to articulate objective consequences that will or may result from excusing standards.

4. Be part of the **solution.** The law requires that you engage in interactive discussions with the employee. Propose your own reasonable solutions if you find the employee's requests unreasonable.

5. Finally, **document, document, document.** At every stage of the process above, put your efforts in writing. Additionally, the documentation should be factual (*i.e.*, what you discussed with the employee, what accommodations were exchanged, etc.), not witty, or condescending to the employee's beliefs. Look at all documents as though they may one day be marked "Jury Exhibit #1." Also, courts and investigators are much more impressed when you conduct due diligence in the course of business rather than reconstruct after the fact.

Accommodation requests can be very fact-specific, and an ounce of prevention is worth far more than the pound of cure in time and money. So, we recommend that all organizations thoroughly address all accommodation requests.

Q & A

Q. We have an employee who cannot perform the essential duties of her position because of a disability. We've tried numerous accommodations but she's still unable to perform those duties. We were thinking about letting her go when, yesterday, another employee let us know that he is going to be leaving soon. It hasn't been announced to the rest of the organization yet. We think the disabled employee could perform the essential functions of that position, but also believe that we could find someone better qualified. Are we required to consider transferring her into that position?

A. The short answer is, "it depends, but probably." The Americans with Disabilities Act states that "a reasonable accommodation may include reassignment to a vacant position if the employee is qualified for the job and it does not impose an undue burden on the employer." Further, anything more, "such as requiring the reassigned employee to be the best qualified employee for the vacant job, is . . . unwarranted by the statutory language or its legislative history." *Smith v. Midland Brake,* 180 F.3d 1153 (10th Cir. 1999). So, you will probably need to transfer the employee into this position unless you can establish that such a transfer imposes an undue burden. You may, though, consider putting the employee on temporary, unpaid leave until the departing employee is closer to leaving.

Q. We are thinking of closing our business because of a snowstorm. Must we pay employees for the time missed?

A. As a general rule, the FLSA requires organizations to pay non-exempt employees for all hours actually worked and pay exempt employees their full salaries for any week in which they work with only specific deduction allowed. So, the FLSA does not require you to pay non-exempt employees for absences due to inclement weather or other disasters, whether the business is closed or the employee cannot reach the workplace when it remains open during the event. But organizations must pay an exempt employee his or her full salary when the employer is closed for inclement weather or other closures if the exempt employee performs any services that workweek. Although, employers may deduct from the employee's paid leave bank if leave is available. But if circumstances require closure for a full workweek, when no work is performed, then the employer could adjust the employee's salary. Keep in mind that the FLSA guidelines are minimum requirements. You may treat employees more favorably if you wish to do so.

Q. An employee received a speeding ticket while driving a company car. He questioned whether the company would pay the ticket. We don't have a policy on this. Are we responsible?

A. No, you probably aren't responsible for paying the ticket. In general, Colorado employers are not responsible for an employee's traffic tickets, even if the employee is driving a company car. With that being said, an employer may choose to pay if the ticket is related to something that's beyond the employee's control; for example, failing to repair a maintenance issue like a burned-out headlight. You may also want to consider including a policy in your handbook that spells out your employees' obligations when driving a company vehicle, including that the employee will be responsible for paying traffic fines or parking tickets, and must notify the company of any vehicle maintenance issues.